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By David Cole

1.

Since the first few days after the terrorist attacks of September 11, 2001, the Bush administration has taken the view that the President has unilateral, unchecked authority to wage a war, not only against those who attacked us on that day, but against all terrorist organizations of potentially global reach. The administration claims that the President's role as commander in chief of the armed forces grants him exclusive authority to select "the means and methods of engaging the enemy."[1] And it has interpreted that power in turn to permit the President to take actions many consider illegal.

The Justice Department has maintained that the President can order torture, notwithstanding a criminal statute and an international treaty prohibiting torture under all circumstances. President Bush has authorized the National Security Agency to conduct warrantless wiretapping of American citizens, despite a comprehensive statute that makes such surveillance a crime. He has approved the "disappearance" of al-Qaeda suspects into secret prisons where they are interrogated with tactics that include waterboarding, in which the prisoner is strapped down and made to believe he will drown. He has asserted the right to imprison indefinitely, without hearings, anyone he considers an "enemy combatant," and to try such persons for war crimes in ad hoc military tribunals lacking such essential safeguards as independent judges and the right of the accused to confront the evidence against him.

In advocating these positions, which I will collectively call "the Bush doctrine," the administration has brushed aside legal objections as mere hindrances to the ultimate goal of keeping Americans safe. It has argued that domestic criminal and constitutional law are of little concern because the President's powers as commander in chief override all such laws; that the Geneva Conventions, a set of international treaties that regulate the treatment of prisoners during war, simply do not apply to the conflict with al-Qaeda; and more broadly still, that the President has unilateral authority to defy international law.[2] In short, there is little to distinguish the current administration's view from that famously espoused by President Richard Nixon when asked to justify his authorization of illegal, warrantless wiretapping of Americans during the Vietnam War: "When the President does it, that means that it is not illegal."

If another nation's leader adopted such positions, the United States would be quick to condemn him or her for violating fundamental tenets of the rule of law, human rights, and the separation of powers. But President Bush has largely gotten away with it, at least at home, for at least three reasons. His party holds a decisive majority in Congress, making effective political checks by that branch highly unlikely. The Democratic Party has shied away from directly challenging the President for fear that it will be viewed as soft on terrorism. And the American public has for the most part offered only muted objections.

These realities make the Supreme Court's decision in *Hamdan* v. *Rumsfeld*, issued on the last day of its 2005– 2006 term, in equal parts stunning and crucial. Stunning because the Court, unlike Congress, the opposition party, or the American people, actually stood up to the President. Crucial because the Court's decision, while on the surface narrowly focused on whether the military tribunals President Bush created to try foreign suspects for war crimes were consistent with US law, marked, at a deeper level, a dramatic

refutation of the administration's entire approach to the "war on terror."

At bottom, the *Hamdan* case stands for the proposition that the rule of law—including international law—is not subservient to the will of the executive, even during wartime. As Justice John Paul Stevens wrote in the concluding lines of his opinion for the majority:

> In undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

The notion that government must abide by law is hardly radical. Its implications for the "war on terror" are radical, however, precisely because the Bush doctrine has so fundamentally challenged that very idea.

2.

Salim Hamdan, a citizen of Yemen, has been held at Guantánamo Bay since June 2002. He is one of only fourteen men at Guantánamo who have been designated by the administration to be tried for war crimes—the remaining 440 or so have never been charged with any criminal conduct. Hamdan was charged with conspiracy to commit war crimes by serving as Osama bin Laden's driver and bodyguard, and by attending an al-Qaeda training camp.

The tribunal set up to try Hamdan was created by an executive order issued in November 2001. Its rules are draconian. They permit defendants to be tried and convicted on the basis of evidence that neither they nor their chosen civilian lawyers have any chance to see or rebut. They allow the use of hearsay evidence, which similarly deprives the defendant of an opportunity to cross-examine his accuser. They exclude information obtained by torture, but permit testimony coerced by any means short of torture. They deny the defendant the right to be present at all phases of his own trial. They empower the secretary of defense or his subordinate to intervene in the trial and decide central issues in the case instead of the presiding judge. And finally, the rules are predicated on a double standard, since these procedures apply only to foreign nationals accused of acts of terrorism, not US citizens.

Hamdan's lawyers challenged the legality of the military tribunals in federal court before his trial had even begun, arguing that the President lacked authority to create the tribunals in the first place, and that the tribunals' structure and procedures violated the Constitution, US military law, and the Geneva Conventions.

To say that Hamdan faced an uphill battle is a gross understatement. The Supreme Court has said in the past that foreign nationals who are outside US borders, like Hamdan, lack any constitutional protections. Hamdan was a member of the enemy forces when he was captured, and courts are especially reluctant to interfere with the military's treatment of "enemy aliens" in wartime. He filed his suit before trial, and courts generally prefer to wait until a trial is completed before assessing its legality. And as recently as World War II, the Supreme Court upheld the use of military tribunals, and ruled that the Geneva Conventions are not enforceable by individuals in US courts but may be enforced only through diplomatic means.

Surprisingly, Hamdan prevailed in the district court, when US District Judge James Robertson courageously ruled that trying Hamdan in a military tribunal of the kind set up by the government would violate the Geneva Conventions. Not surprisingly, that decision was unanimously reversed, on every conceivable ground, by the Court of Appeals for the D.C. Circuit, in an opinion joined fully by then Judge, now Chief Justice, John Roberts. And as if Hamdan did not face enough hurdles, after the Supreme Court agreed to hear his case, Congress passed a law that appeared to be designed to strip the Supreme Court of its jurisdiction to hear the case. The Detainee Treatment Act of 2005 required

defendants in military tribunals to undergo their trials before seeking judicial review, and prescribed the D.C. Circuit as the exclusive forum for such review.

In its arguments to the Supreme Court, the administration invoked the Bush doctrine. It argued that the President has "inherent authority to convene military commissions to try and punish captured enemy combatants in wartime," even without congressional authorization, and that therefore the Court should be extremely hesitant to find that Bush's actions violated the law.[3] And it insisted that in declaring that the Geneva Conventions did not apply to al-Qaeda Bush had exercised his constitutional war powers, and his decision was therefore "binding on the courts."[4]

The Supreme Court, by a vote of 5–3, rejected the President's contentions. (Chief Justice Roberts did not participate, since it was his own decision that was under review.) The Court's principal opinion was written by its senior justice, John Paul Stevens, a World War II veteran, and the only justice who has served in the military. He was joined in full by Justices Ginsburg, Souter, and Breyer, and in the main by Justice Kennedy. Kennedy also wrote a separate concurring opinion, and because he provided the crucial fifth vote, his views may prove more significant in the long run.[5]

The Court found, first, that the administration's procedures for military tribunals deviated significantly from the court-martial procedures used to try members of our own armed forces, and that the Uniform Code of Military Justice barred such deviations unless it could be shown that court-martial procedures would be "impracticable." The administration made no such showing, the Court observed, and therefore the tribunals violated the limit set by Congress in the Uniform Code. The Court could well have stopped there. This conclusion was a fully sufficient rationale to rule for Hamdan and invalidate the tribunals. Had it done so, the decision would have been far less consequential, since Congress could easily have changed its law or declared that court-martial procedures are impracticable.

But the Court went on to find that Congress had also required military tribunals to conform to the law of war, and that the tribunals impermissibly violated a particular law of war—Common Article 3 of the Geneva Conventions, which requires that detainees be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Common Article 3 is denominated "common" because it appears in each of the four Geneva Conventions. It sets forth the basic human rights that apply to all persons detained in conflicts "not of an international character." The administration has long argued that because the struggle with al-Qaeda is international, not domestic, Common Article 3 does not apply. The Court rejected that view, explaining that the phrase "not of an international character" was meant in its literal sense, to cover all conflicts not between nations, or "international" in character. (Conflicts between nations are covered by other provisions of the Geneva Conventions.) Since the war with al-Qaeda is a conflict between a nation and a nonstate force, the Court ruled, it is "not of an international character," and Common Article 3 applies.

The Bush administration devoted much of its brief to arguing that the Geneva Conventions are not enforceable by individuals in US courts, and Hamdan's lawyers devoted equal space to arguing the opposite. The Court, however, neatly sidestepped that question, finding that it need not decide it because Congress had incorporated the Geneva Conventions into US law when it required that military tribunals adhere to the "law of war."

The fact that the Court decided the case at all in the face of Congress's efforts to strip the Court of jurisdiction is remarkable in itself. That the Court then broke away from its history of judicial deference to security claims in wartime to rule against the President, not even pausing at the argument that the decisions of the commander in chief are "binding on the courts," suggests just how troubled the Court's majority was by the President's assertion of unilateral executive power. That the Court relied so centrally on international law in its reasoning, however, is what makes the decision truly momentous.

3.

The *Hamdan* decision has sweeping implications for many aspects of the Bush doctrine, including military tribunals, NSA spying, and the interrogation of al-Qaeda suspects. With respect to trying alleged war criminals, the administration now has two options. Without changing the law, it can put into effect the regular court-martial procedures that are used for trying members of the American military. The administration has already rejected that option, and has instead said that it will ask Congress for explicit approval of military tribunals that afford defendants fewer protections than courts-martial would. Because the Court's decision rests on statutory grounds, the President could in theory seek legislation authorizing the very procedures that the Court found wanting. Already, Senators Jon Kyl, Lindsay Graham, Arlen Specter, and others have announced that they will seek legislation to authorize military tribunals.

But because the Court also ruled that Common Article 3 of the Geneva Conventions applies, and that the tribunals as currently constituted violate that provision, legislative reform is not so simple. Were Congress to approve the tribunals in their present form, it would thereby be authorizing a violation of Common Article 3. Congress unquestionably has the legal power, as a matter of domestic law, to authorize such a violation. Treaties and legislation are said to be of the same stature, and therefore Congress may override treaties by enacting superseding laws. But passing a law that blatantly violates a treaty obligation is no small matter. And the US has a strong interest in respecting the Geneva Conventions, since they protect our own soldiers when captured abroad. It is one thing to put forward an arguable interpretation of the treaty, as the administration did in contending that Common Article 3 simply did not apply in Hamdan's case. It is another thing to blatantly violate the treaty. As a result, the *Hamdan* decision is likely to force the administration to make whatever procedures it adopts conform to the dictates of Common Article 3.

The Court's decision also has significant implications for the controversy over President Bush's authorization of NSA spying without court approval. On its face, that program violates the Foreign Intelligence Surveillance Act of 1978, which requires that a special court grant permission for wiretapping. The administration has defended the NSA program with two arguments. It claims that Congress implicitly authorized the program when it enacted the Authorization for Use of Military Force (AUMF) against al-Qaeda in 2001. And it maintains that the President has inherent unilateral power to authorize such surveillance as commander in chief, notwithstanding the fact that it was criminally banned by the Foreign Intelligence Surveillance Act.[6]

In Hamdan's case, the administration similarly argued that the AUMF of 2001 authorized the military tribunals, and that in any event the President had unilateral authority to create the tribunals as commander in chief. The Court dismissed both contentions. It reasoned that since the AUMF said nothing specifically about military trials, it could not override the explicit congressional legislation restricting the use of military tribunals. And it ruled that whatever inherent power the President might have in the absence of congressional legislation, "he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."

These conclusions squarely refute the only arguments the President has advanced to justify the NSA spying program. The AUMF of 2001 is as silent on wiretapping as it is on military tribunals. Here too, then, the President may not disregard Congress's express limitations on his powers.

4.

The most far-reaching implications of the Court's decision, however, concern the interrogation of al-Qaeda suspects. The administration has since the outset of the conflict sought to evade the limitations

set by international law on coercive interrogation, reasoning that the need for "actionable intelligence" trumps the human dignity of its detainees.[7] According to a January 25, 2002, memo from then White House Counsel Alberto Gonzales to the President, the desire to extract information from suspects was a prime motivating factor behind the administration's decision that the Geneva Conventions do not apply to the conflict with al-Qaeda. The Justice Department's infamous "torture memo" of August 2002 argued, among other things, that threatening death and inflicting pain short of death or organ failure were not "torture," and that in any event the President as commander in chief could order torture despite a criminal statute prohibiting it.

The administration also secretly interpreted the International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, ratified by Congress in 1994, to *permit* cruel and degrading treatment of foreign nationals held outside US borders. When Senator John McCain convinced Congress to overrule that interpretation by statute, the administration lobbied members of Congress to ensure that the McCain Amendment contained no enforceable sanctions. It then attached a "signing statement" to the law proclaiming that the President would obey the amendment only to the extent that it did not interfere with his decisions as commander in chief—in other words, only when he chose to obey it.

The *Hamdan* decision, while not explicitly addressed to the question of interrogation, should resolve this debate. Common Article 3 of the Geneva Conventions, which the Court has now authoritatively declared applies to the conflict with al-Qaeda, requires that all detainees be "treated humanely," and protects them against "outrages upon personal dignity, in particular humiliating and degrading treatment." Moreover, the federal War Crimes Act makes it a felony, punishable in some instances by death, to violate Common Article 3 in any way. Thus, CIA and military interrogators are now on notice that any inhumane treatment of a detainee subjects them to prosecution as a war criminal. While they might be confident that the Bush administration would not prosecute them, they cannot be sure that a future administration would overlook such war crimes. And it is quite possible that government officials might actually decide not to commit war crimes—now that they know they are war crimes—even if prosecution is unlikely.

On July 11, the administration announced that Deputy Secretary of Defense Gordon England had issued a memo to military officers instructing them that the Supreme Court had ruled that Common Article 3 applies to the conflict with al-Qaeda, and ordering them to ensure that their practices conformed to Common Article 3. Some news accounts characterized this as a "major policy shift," but in fact the memo merely states what the Supreme Court decided. The memo did suggest that the military had always been abiding by a directive from President Bush to treat detainees "humanely." What it did not say, however, is that administration lawyers had claimed under that dictate that the following tactics were legally available for interrogating al-Qaeda suspects: forced nudity; "using detainees[']' individual phobias (such as fear of dogs) to induce stress"; waterboarding; and "scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family." In addition, the military found nothing inhumane with the interrogation of a Guantánamo detainee that included forcing him to strip naked and wear women's underwear, putting him on a leash and making him bark like a dog, and injecting him with intravenous fluids and then barring him from going to the bathroom, forcing him to urinate on himself. If the military considers all of this "humane," the assertion that it will abide by Common Article 3 is meaningless.

Some members of Congress have specifically objected to the implications of the Court's reliance on Common Article 3, and have suggested that they might try to undo it. Senator Graham has complained that the Court's ruling might make our soldiers liable for war crimes. But if American soldiers commit war crimes, they should be held responsible. Congress only recently passed the McCain Amendment's ban on all cruel, inhuman, and degrading treatment by overwhelming margins. Surely the last message we should want to send to the rest of the world is that the McCain Amendment was only for show, because we are not actually willing to be bound by these rules if they have any enforceable effect.

In fact, the Court's decision further suggests that President Bush has *already* committed a war crime, simply by establishing the military tribunals and subjecting detainees to them. As noted above, the Court found that the tribunals violate Common Article 3, and under the War Crimes Act, any violation of Common Article 3 is a war crime. Military defense lawyers responded to the *Hamdan* decision by requesting a stay of all tribunal proceedings, on the ground that their own continuing participation in those proceedings might constitute a war crime. But according to the logic of the Supreme Court, the President has already committed a war crime. He won't be prosecuted, of course, and probably should not be, since his interpretation of the Conventions was at least arguable. But now that his interpretation has been conclusively rejected, if he or Congress seeks to go forward with tribunals or interrogation rules that fail Article 3's test, they, too, would be war criminals.

5.

Some have argued that the Court's decision in *Hamdan* was limited, because it rested on statutory rather than on constitutional grounds, and thereby left the door open for Congress to respond. But in choosing to decide the case despite Congress's apparent attempt to divest the Court of jurisdiction, in holding that the President is bound by congressional limitations even when acting as commander in chief, and most importantly in declaring that Common Article 3 governs the conflict with al-Qaeda, the Court's decision is anything but restrained. It is a potent refutation of the Bush doctrine, and a much-needed resurrection of the rule of law.

This lesson is especially clear when *Hamdan* is read in conjunction with the Court's decisions two years ago in the "enemy combatant" cases. In those cases, also clear defeats for the President, the Court rejected the administration's arguments that prisoners at Guantánamo had no right of access to federal courts to challenge the legality of their detention, and that US citizens held as "enemy combatants" had no right to a hearing to challenge whether they were in fact "enemy combatants." The administration's lawyers had put forward the Bush doctrine there, too, arguing that it would be unconstitutional for Congress or the courts to interfere with the President's unilateral power as commander in chief to detain the enemy. But the Court rejected that view, insisting that

> whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[8]

The *Hamdan* decision confirms not only that all three branches have a role to play, but that international law itself has an essential role, in particular the laws of war that the administration has for so long sought to evade. The significance of the decision is perhaps best captured by the reaction of two of the Bush doctrine's principal architects. John Yoo, the former Justice Department lawyer who wrote the torture memo, objected that "what the court is doing is attempting to suppress creative thinking.... It could affect every aspect of the war on terror." And Bradford Berenson, associate White House counsel from 2001 to 2003, lamented that "what is truly radical is the Supreme Court's willingness to bend to world opinion."

If by "creative thinking" Yoo means torturing suspects, "disappearing" them into CIA black sites, holding them indefinitely without hearings, and trying them in tribunals that permit people to be executed on the basis of secret evidence, then perhaps creative thinking should be suppressed. Bending to world opinion would indeed be a radical change for a president who, during the 2004 presidential debates, derisively rejected concern with how the United States is seen around the world as an unacceptable "global test." But making US practice conform to the international rules that formally reflect world opinion is a necessary first step if we are to begin to reduce the unprecedented levels of anti-American sentiment found among our allies and foes alike, and offset the propaganda advantage our unilateral approach has given to al-Qaeda.

The Bush doctrine views the rule of law as our enemy, and claims it is allied with terrorism. As the Pentagon's 2005 National Defense Strategy put it:

> Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.

In fact, both the strength and security of the nation in the struggle with terrorists rest on adherence to the rule of law, including international law, because only such adherence provides the legitimacy we need if we are to win back the world's respect. *Hamdan* suggests that at least one branch of the United States government understands this.

—July 12, 2006

Notes

[1] Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" (January 19, 2006), available at www.cdt.org/security/nsa/20060116doj.pdf.

[2] For a discussion of the jurisprudential underpinnings of the administration's theory, see my review of John Yoo's book, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, in *The New York Review*, November 17, 2005. As a young lawyer at the Justice Department on September 11, Yoo was instrumental in developing the legal justifications for the administration's "war on terror."

[3] Brief for Respondents in *Hamdan*v. *Rumsfeld*, at p. 8.

[4] Brief for Respondents in *Hamdan* at p. 38.

[5] Because only eight justices participated, Kennedy's vote was crucial in the sense that had he sided with the dissenters, the Court would have divided evenly, 4–4, which would have had the legal effect of affirming the Circuit Court's decision. In future cases involving military tribunals, Chief Justice Roberts will presumably participate and side with the dissenters, and in that event Justice Kennedy's vote will again be decisive.

[6] For a detailed analysis and refutation of the government's arguments, see "On NSA Spying: A Letter to Congress," *The New York Review*, February 9, 2006.

[7] See Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York Review Books, 2004).

[8] *Hamdi*v. *Rumsfeld*, 542 U.S. 507 (2004).